IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

TINA LASHER,

Plaintiff,

Civil Action No.
1:11-CV-0777 (DEP)

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

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DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse determination by the Commissioner, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on March 19, 2012 during a telephone conference which was both digitally recorded, and at which a court reporter was also present. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's decision did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in her appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, with a directed finding of disability, for a calculation of benefits owing to the plaintiff.

4) The clerk is directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: March 28, 2012
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
----------x
TINA LASHER,

Plaintiff,

vs. 11-CV-777

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
----------x

Transcript of *Telephone Conference* held on March 19, 2012, at the James Hanley Federal Building, 100 South Clinton Street, Syracuse, New York, the HONORABLE DAVID E. PEEBLES, Magistrate-Judge, Presiding.

A P P E A R A N C E S

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THE CLERK: This is Shelly with Judge Peebles chambers, recording this conference call. Case is Tina Lasher versus Commissioner of Social Security; 11-cv-777. Counsel, can you please note your appearances for the record?

MR. MARGOLIUS: Peter M. Margolius, attorney for appellant, with Janice Cammarato.

MR. SCHABACKER: This is Noah Schabacker, the attorney for the Social Security Administration.

THE COURT: Good afternoon, Counsel. Mr. Margolius, can you spell Janice's last name one more time for our court reporter?

MR. MARGOLIUS: C-A-M-M-A-R-A-T-O.

THE COURT: Thank you.

I have before me cross-motions, in essence, for judgment on the pleadings in connection with this Social Security appeal under Section 205(g) of the Act. Mr. Margolius, speaking very slowly, is there anything you would like to add to the materials and arguments set forth in your brief?

MR. MARGOLIUS: Your Honor, this is not really part of an argument, but I don't know if you're aware of this or not or should be, but the claimant applied again after the Administrative Law Judge's decision, and without going to hearing was granted benefits as of the day after the Judge's decision. So, the claimant was granted Social Security

Disability, we're talking about the period up to the date of the Judge's decision as of right now, I believe.

THE COURT: Do you contend that that fact should be considered by the Court in deciding this appeal?

MR. MARGOLIUS: I don't -- I don't know. I don't know if you're aware of it or shouldn't be, maybe you shouldn't be aware of it. But no, I don't see how that given a different level, it was the same evidence, but your decision is your decision, you know.

THE COURT: Right. And, of course, the agency may have had additional information. It clearly had Dr. Whipple's information, the October 19, 2010 letter, which post-dated the Administrative Law Judge's decision.

MR. MARGOLIUS: Right. And that's an issue here today.

THE COURT: I know it is. All right. Anything else you would like to add before I turn the floor over to Mr. Schabacker?

MR. MARGOLIUS: No, sir. I think it's all set out in our brief. Thank you.

THE COURT: Mr. Schabacker, anything you would like to point out on behalf of the Commissioner?

MR. SCHABACKER: Thank you, Your Honor, yes. I would like to make three brief points. The first is that the additional evidence that claimant submitted doesn't

change the fact that she wasn't disabled prior to the Administrative Law Judge's decision. The subsequent evidence from Dr. Whipple was written eight months after the ALJ's February 2010 decision. He didn't provide any new or supplemental opinion evidence. He didn't make any additional conclusions about the relevant period. And he didn't change his previous finding that plaintiff didn't have any restrictions on the use of her right arm.

Secondly, I would like to point out that the Administrative Law Judge properly assessed the weight to be given to the treating physician opinions in the record.

Now, plaintiff made quite a bit -- put a large amount of weight on Dr. Danisi's statement of disability, but Dr. Danisi's statement of disability wasn't supported by the objective medical evidence, and was actually contradicted by his own internally inconsistent assessments of plaintiff. And just from a legal standpoint, I would like to point out that these statements of disability by a treating source, it's the Commissioner who makes the decision, the ultimate decision about whether a claimant is disabled, and the treating source's statement on that matter is not binding on the Commissioner.

Secondly, the Northern District precedent establishes -- and I'll point out here that Dr. Danisi's statement of disability was for purposes of a Workers'

Compensation claim. Northern District precedent is clear that in such cases, because the statements are given for claims that are handled under different standards, and also because Workers' Compensation assessments are backward looking to the employee's previous job, they don't apply for Social Security Disability cases.

And then factually, Dr. Danisi's objective findings don't support the conclusions. And, in fact, his objective findings are internally inconsistent in his statement of disability. It was internally inconsistent on January 2009 he indicated that plaintiff couldn't sit, stand or walk at work and couldn't lift any weight, reach below her waist and could never climb, stoop, kneel, crouch, or crawl. But at the same time she could occasionally drive and balance and reach above her shoulder and work at desk and waist level and handle with her right and left hand and with her fingers.

So, just to be clear here, apparently she can drive but she can't sit. His assessment doesn't make any sense on its own terms.

And then compared to his own assessments, he didn't base his statement of disability on objective evidence in the record. In October he assessed that she had good strength and intact sensation throughout her body. In November of 2008 EMG results on her right arm were normal, but he still said that she was disabled. And in January 2009

Dr. Danisi didn't even examine plaintiff. And she denied any weakness. But again he said that she was disabled.

So, we would submit that Dr. Danisi's statement of disability, the ALJ assessed it properly and gave it very little weight.

And the other evidence in the record shows that plaintiff wasn't disabled. Dr. Balagtas' consultative examination from November 2008 showed that plaintiff had normal hand and finger dexterity and strength. Treating physician Dr. Burdick concluded in March of 2009 that plaintiff had no loss of use of her right arm. And Dr. Whipple observed again that the only limit on the use of her right arm was some decreased sensation in her palm. And the same doctors, as well as Dr. Aboelsaad, all found that plaintiff could walk normally.

THE COURT: Did you say that -- I'm sorry to interrupt. Did you say that Dr. Danisi did not examine the plaintiff in January of 2009? Because I see a visit of January 8, 2009, and another January 20, 2009, at pages 227 through 30 of the administrative transcript.

MR. SCHABACKER: Yes, Your Honor. At that visit, if you read through it, while she visited, there is no indication that he performed any sort of physical evaluation of plaintiff's ability to move her arms or legs or anything like that. Looking at page 228 of the record, he records

that plaintiff complained that she couldn't afford some of her medicine and also recorded some complaints of hers. But as you follow along on page 229, he didn't fill out any of the assessment boxes on the actual examination. And, again, down at the bottom he just lists a plan; he doesn't, again, have any sort of objective evaluation of her. And in point number three on that is that she is totally disabled, despite the fact that he didn't perform any sort of physical evaluation.

THE COURT: All right. Sorry I interrupted. Did you have another point to make?

MR. SCHABACKER: Yes, Your Honor. I just wanted to finish by saying that, you know, this recording of plaintiff's subjective complaints leads to my third point, which is that the Administrative Law Judge properly assessed plaintiff's subjective complaints as not entirely credible. And the thing I want to start out with is that plaintiff stopped working because -- she stated that she stopped working because her employer took away a stool that she was using at work. But as I reviewed the objective evidence from her physicians, she didn't have impairments that were as severe as she claimed. But even her own statements in her application materials and at the hearing, she said that she could perform a wide range of daily activities. She washed dishes, washed and folded laundry, she went out with her

husband, she shopped, cleaned, cooked. She was able to perform all of these activities of daily living. And so even on her own statements she wasn't as impaired as she claimed she was.

I'll also address just very briefly that in plaintiff's brief she claimed that the ALJ made an adverse credibility finding based on her failure to follow prescribed treatment. Now, there is two things going on here. First, under Social Security Ruling 96-7p, it's perfectly appropriate for the Administrative Law Judge to assess -- to assess someone's credibility based on whether or not they follow prescribed treatment. Secondly, even if you look at the Administrative Law Judge's decision, you will see that he considered her failure to follow prescribed treatment in assessing whether her impairments were severe within the meaning of the Act and not as part of the credibility determination.

On transcript page 14, that's where he looks at whether or not her impairments were severe, and that's where the Administrative Law Judge discusses the failure to follow prescribed treatment. Following on transcript pages 15 through 18, separate section, is where he considers plaintiff's credibility.

And, finally, plaintiff raised the issue of the ALJ considering her use of Hydrocodone, which she claimed

she used only when the pain became essentially unbearable. And plaintiff took issue with the Judge's reference to this because she claimed at the hearing for the first time that she experienced some side effects from this medication. But examining the record, it's recorded in two places, transcript page 182 and transcript page 204, that plaintiff's physician reviewed her use of this medication and she never mentioned any side effects. So, again, the Judge was perfectly entitled to use this in evaluating plaintiff's credibility.

In closing, Your Honor, the agency submits that the evidence clearly shows that plaintiff was not disabled at the time of the Administrative Law Judge's decision and, therefore, she's not entitled to benefits.

MR. MARGOLIUS: May I respond, Your Honor?

THE COURT: Yes, Mr. Margolius.

MR. MARGOLIUS: I'm just going to respond to one point. The ALJ, who I've known for many years, okay, he is generally a fair person, but he may have warranted a very unfair assessment here. I'm assuming he made it by accident. And my colleague just argued the same point, treated unfairly. The ALJ and my learned colleague have relied upon the fact that claimant did not follow through on treatment. That's absolutely correct. But she did not follow through on treatment until payment for such treatment was approved by the Workers' Comp. Board and the insurance company and she

was allowed to have it. Once treatment was approved and paid for, she had it. She couldn't afford to have it before it was approved, and I don't think that should be held against her. And the ALJ did and my colleague had just compounded that argument. I don't think that should be held against her in not having treatment. Thank you, Your Honor.

MR. SCHABACKER: May I respond, Your Honor?

THE COURT: Yes.

MR. SCHABACKER: Thank you very much. Once again, Your Honor, if you look at the decision, the Administrative Law Judge did not, in fact, hold plaintiff's failure to follow prescribed treatment against her. He didn't consider it in his credibility determination. So, plaintiff's argument on that point is addressing something that's not even in the record. It's simply not there and it's simply not a basis to overturn the decision.

MR. MARGOLIUS: You just argued yourself saying that she didn't go through treatment. Where is it in here? I don't know how you count it for credibility but you count it for something else, didn't promptly take advantage of treatment. Well, she didn't take advantage of treatment until it was paid for.

THE COURT: I think I understand the arguments on both sides of that issue. I'll have to let that be the last word.

Let me lay some background as a backdrop for my decision. The plaintiff applied for disability insurance benefits under the Act. After the initial denial of that application, a hearing was conducted by Administrative Law Judge Carl Stephan, resulting in a written decision issued on February 12, 2010.

In his decision the Administrative Law Judge, or ALJ, went through the now familiar five-step test for determining disability. At Step One he concluded that plaintiff had not engaged in substantial gainful activity since her alleged onset date. At Step Two he found that she suffers from severe impairments within the meaning of the Act and the corresponding regulations, including lumbar spine disorder, cervical spine disorder, and restless leg syndrome. But concluded at Step Three that none of those met or medically equaled any of the listed presumptively disabling impairments set forth in the regulations.

He then surveyed the medical evidence and determined that plaintiff, despite her condition, retains the residual functional capacity, or RFC, to perform a full range of light work as defined under the regulations. In arriving at that determination, he rejected opinions contrary to his findings of two treating sources and rejected plaintiff's subjective complaints concerning her limitations.

He then concluded at Step Four that she is

capable of performing her past relevant work as a cashier, but went on, in any event, to conclude that consideration of the medical vocational guidelines, or the Grid, would in light of her relevant characteristics and the ALJ's RFC finding support a finding of no disability.

My function is to review that determination which became final and the Social Security Administration appeals council denied review, whether it is the result of the application of proper legal principles and is supported by substantial evidence.

The first issue raised by the claimant, or plaintiff in this case, concerns the October of 2010 findings or letter from Dr. Richard Whipple concerning plaintiff's right arm and elbow. It is being advanced by the plaintiff as new and material evidence which should be considered by the Court.

As you know, under the regulations and at least in this circuit, evidence is new if it is not merely cumulative of what is already in the record, and is material if it is both relevant to the claimant's condition during the time period for which benefits have been denied, that is the period on or before the ALJ's decision, and probative, meaning that there is a reasonable probability that the new evidence would have influenced the Commissioner to decide claimant's application differently.

There are many, many cases that support that proposition. The leading is probably *Pollard against Halter*, recorded at 377 F.3d 183. It's a Second Circuit decision from 2004. More recently the same principle annunciated in *Sergenton v. Barnhart*, 470 F.Supp.2d 194, Eastern District of New York reported decision from 2007.

Close case, but I do think if you look at Dr. Whipple's letter, it is new, it is not cumulative. I think it is probative and could well have influenced the ALJ's decision. It reports of an MRI scan that was performed once it finally apparently was approved, and it showed that she has lateral epicondylitis and partial tearing of the extensors, as well as some thickening of the collateral ligament laterally, although with no definitive tear.

And although one could surmise I think the lack of -- the fact of the plaintiff's May 2008 accident involving her right arm and the lack of any evidence that the condition was deteriorating suggests to me that this is relevant to the plaintiff's condition at the time prior to the ALJ's decision, and I think it could have influenced the ALJ's decision in this case. To me the more problematic part of the ALJ's decision is his rejection of opinions of Dr. Danisi and Dr. Marici.

MR. SCHABACKER: Your Honor, if I may. I'm sorry to interrupt you, but I believe you may be referring to

the wrong standard. I believe that you're referring to the standard for evidence before the Court for the first time and not evidence before the appeals council for the first time.

THE COURT: Well, I think my sense is that that's controlled by *Lisa against Secretary of Health and Human Services*. There would have to be a showing of good cause, which I think was demonstrated. In your view does *Lisa* not apply in this case?

MR. SCHABACKER: No, Your Honor, it doesn't. And part of the reason for that is that the appeals council did consider this evidence. As it states in the -- let me pull up the page number for you real quick. I apologize. At the end of the transcript rather than the beginning. On page 4 of the transcript, it indicates that the appeals council considered this evidence and decided that it did not provide a basis for making a different decision or disturbing the Commissioner's decision.

And, Your Honor, the relevant Second Circuit cases on this are -- I apologize, I don't have the full citation in front of me, but the relevant cases are *Tirado*, T-I-R-A-D-O, and *Lisa*, L-I-S-A. And if you would like me to find the citations, I can do that for you very quickly.

THE COURT: No. I just mentioned *Lisa*, and I also have *Tirado* before me, which is specifically referenced in the Second Circuit's decision in *Pollard* as applying to

whether new evidence is material. So, I guess I don't understand your argument, but let me continue with my decision.

In any event, the problem I have with the Commissioner's decision is the rejection of the opinions of plaintiff's treating sources. As you know, the regulations are very specific, that treating physicians concerning the nature and the severity of an impairment are entitled to considerable deference so long as it's supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence.

Of course, they're not controlling if they're contrary to other substantial evidence in the record, including the opinions of other medical experts. If an ALJ is rejecting a treating source's opinion, the ALJ must apply certain factors and determine what degree of weight to assign to the opinion. And those factors include the length of the treatment, of the treatment relationship, the frequency of examination, the nature and extent of the treatment relationship, the degree to which the medical source supported his opinion, the degree of consistency between the opinion and the record as a whole, whether the opinion is given by a specialist, and other evidence that may be brought to his attention. And when rejecting a treating physician's opinion, the ALJ must provide reasons for the rejections.

In this case I don't agree that the treating sources, including Dr. Danisi and Dr. Marici, are not supported by substantial evidence. Dr. Danisi followed the plaintiff for her back, stated that she cannot perform even sedentary work. It appears to be supported by his records, including at pages 184 through 186 and 198 of the administrative transcript. Dr. Marici gave a similar assessment on July 16, 2009. And I don't believe that those opinions were rejected with the proper explanation, nor do I believe that they were contrary to substantial evidence or the physician's own notes.

I recognize that the mere fact of saying that the plaintiff is disabled is a matter that is specifically reserved to the Commissioner. I understand that. But I also have RFC findings that are from those treating sources that are inconsistent with the finding of the ability of the claimant to perform light work.

I also note that Dr. Balagtas didn't altogether contradict these findings in her November 20, 2008 consultative report. She -- he or she, I can never remember if it's a he or she -- acknowledged that there might be some moderate limitations associated with plaintiff's condition and didn't go any further to specify.

I also think that the Administrative Law Judge did not reject the plaintiff's subjective complaints on a

proper basis. As you know, the plaintiff may make subjective complaints. An ALJ must factor that into his or her analysis. Obviously, the ALJ is not required to accept the subjective testimony of the claimant blindly but has discretion on how to evaluate it. But in doing that, the ALJ has to consider a variety of factors and indicate how those factors weighed in favor of or against acceptance of the plaintiff's testimony.

In this case the claimant clearly suffers from medical impairments that could reasonably be anticipated to produce the level of pain she claims. She claimed during the hearing that she has pain every day, all day. That's at page 35 of the administrative transcript. That the pain radiates down both legs and down both arms. That's at page 40. As a result she can only pick up a few pounds and cannot sit for lengthy periods of time. She did acknowledge performing some household chores; she cooks, she washes dishes, she does laundry, although the laundry is carried by someone other than herself, she does it and folds it.

Obviously the ALJ took into account and has to consider the plaintiff's daily activities, the location, duration, frequency and intensity of her symptoms, precipitating and aggravating factors, the type, dosage, effectiveness and side effects of medications, other treatments received and other measures taken to relieve the

symptoms.

Plaintiff testified that she has a TENS unit. She did not at one point undergo physical therapy I believe for financial reasons, the record discloses. It also discloses that she is taking Topamax and Hydrocodone, although she does not take the Hydrocodone except when she absolutely has to. But she did explain in the hearing that that is because of the side effects, the drowsiness and memory loss that she suffers from taking that medication.

And I don't think that the level of daily activities that she testified to, operating at the computer, doing some light chores, being able to take care of herself, undermine her claims of disabling pain. So, in my view, for these reasons the Commissioner's determination is not supported by substantial evidence.

The last question is to determine whether the matter should be remanded solely for calculation of benefits or whether I should find that there is persuasive proof of disability and further development of the record would not serve any purpose. I make that finding in this case. I think the record clearly satisfies me that she is disabled and, therefore, will reverse the Commissioner's determination, direct a finding of disability and remand the matter for calculation of benefits.

I will issue a short form order incorporated

by reference, this verbal determination, which will then result in the entry of judgment from which the Commissioner obviously can appeal.

I appreciate the excellent presentation on the part of both sides, both in writing and verbally. And Mr. Schabacker, I've enjoyed working with you. I thought your argument was excellent, and I look forward to working with you in the future. As well as you, Mr. Margolius.

MR. MARGOLIUS: Thank you very much, Your Honor.

MR. SCHABACKER: Thank you.

THE COURT: Thank you both.

* * *

C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, and that the foregoing is a true and correct transcript thereof.

_____

EILEEN MCDONOUGH, RPR, CRR
Official U.S. Court Reporter